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No. 91-712

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

HUMBERTO ALVAREZ-MACHAIN,

Respondent.

On Writ of *Certiorari* To The United States Court of Appeals For The Ninth Circuit

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1/]

Amicus Curiae the Association of the Bar of the City of New York has a great interest in the questions presented by this case: whether the abduction of a foreign national by the United

1/ The parties have consented to the filing of this brief. Letters of consent are on file with the Clerk of the Court, pursuant to Rule 37.3 of the Rules of this Court.

States Government from another country with whom the United States has an extradition treaty[2/] to face criminal prosecution in the United States violates that treaty, and whether the abducted foreign national may properly raise that treaty violation as a defense to the United States' court's jurisdiction over him.

The Association of the Bar of the City of New York ("the Association") is a professional association of approximately 19,000 lawyers throughout the United States and in over forty other countries. Since its inception in 1870, the Association has been dedicated to the preservation and advancement of the rule of law and the fair administration of justice. The scope of the Association's concern with justice has not been limited to the confines of the City of New York but extends beyond local borders.

For many years the Committee on International Human Rights has been a standing committee of the Association. A 1985 Resolution of the Association states that "the Association of the Bar of the City of New York affirms its support for the Rule of Law in the international community ..." In its efforts to promote the rule of law, the Association has issued reports on international agreements and pending United States legislation relating to international human rights; filed *amicus* briefs in relevant court cases; intervened on behalf of foreign lawyers and judges who have been persecuted or imprisoned for exercising their professional responsibilities; and

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[2/] The extradition treaty at issue in this case is that between the United States and Mexico, May 4, 1989 31 U.S.T. 5059, T.I.A.S. No. 9656 (the "Extradition Treaty").

sent delegations to several countries and published the reports of their findings.[3/]

This case is of vital importance to the Association. The Association respects and supports the principle that international relations ought to be governed by and conducted in accordance with the rule of law. The recent much-heralded end of the "Cold War" presents the first opportunity in generations for the community of nations to structure a new international order based on respect for the rule of law under which nations will conduct themselves in accordance with their multilateral and bilateral obligations, particularly those obligations imposed by treaties into which they have freely entered.

The outcome of this case, *i.e.*, whether this Court will permit the United States to circumvent its solemn extradition treaty obligations by authorizing forcible abductions of foreign nationals from their own countries to face criminal prosecution in the United States, bears directly on the larger question of whether the community of nations chooses to conduct its own affairs in accordance with the rule of law.

As an organization of lawyers concerned with the enforceability of international law and treaty obligations, the Association is especially troubled by the Government's argument that courts are powerless to remedy forcible abductions that circumvent and violate extradition treaties because such matters raise nonjusticiable "political questions" or the abducted defendants lack standing to

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[3/] *See, e.g., Justice in El Salvador: A Report of a Mission of Inquiry*, 38 Record of the Association 112 (Mar. 1983); *Human Rights and the Administration of Justice in Chile*, 42 Record of the Association 431 (May 1987); *Criminal Justice and Human Rights in Northern Ireland*, 43 Record of the Association 110 (Mar. 1988).

raise such treaty violations as a defense. The argument, if accepted, would force courts effectively to abet such violations and deprive the extradition treaties of the force of law. Accordingly, while the Association supports the arguments made by the respondent and other *amici* that the extradition treaty precludes abduction as a means for securing criminal jurisdiction, the Association limits its *amicus* brief to the issues of justiciability and standing raised by the Government.

SUMMARY OF ARGUMENT

A. The Court of Appeals[4/] correctly held that the issues presented in this case are justiciable and are not political questions requiring this Court to defer to the Executive Branch. Rather, this case involves the interpretation of an extradition treaty entered into by the United States—an exercise that this Court has long considered outside the realm of the political question doctrine. *Baker* v. *Carr*, 369 U.S. 186, 211 (1962); *Japan Whaling Association* v. *American Cetacean Society*, 478 U.S. 221, 229-230 (1986).

Moreover, courts have traditionally interpreted extradition treaties and issues relating to them and have traditionally rejected attempts to preclude judicial review under the guise of the political question doctrine. *United States* v. *Rauscher*, 119 U.S. 407 (1886); *Galanis* v. *Pallanck*, 568 F.2d 234 (2d Cir. 1977); *In re Mackin*,

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[4/] Petitioner, United States of America (the "Government") appeals from the decision issued on October 18, 1991 by the Court of Appeals in *United States* v. *Alvarez-Machain*, ("Alvarez-Machain") 946 F.2d 1466 (9th Cir. 1991), which decision relied on the Court of Appeals' decision in a case that raised virtually the same issues—*United States* v. *Verdugo-Urquidez*, 939 F.2d 1341 (9th Cir. 1991), *petition for cert. pending*, No. 91-670 ("*Verdugo-Urquidez*"). In *Alvarez-Machain*, the Court of Appeals held that its decision in *Verdugo-Urquidez* applied *a fortiori* to the instant case. 946 F.2d at 1466.

668 F.2d 122, 132-33 (2d Cir. 1981); *Eain* v. *Wilkes*, 641 F.2d 504, 513-16 (7th Cir. 1981), *cert. denied*, 454 U.S. 894 (1981); *Quinn* v. *Robinson*, 783 F.2d 776, 790-91 (9th Cir. 1986).

B. The Court of Appeals correctly held that respondent has standing to assert the United States' violation of the Extradition Treaty as a defense to the district court's jurisdiction over him. This Court held long ago that individual defendants have standing to raise violations of extradition treaties as defenses to criminal prosecutions in United States courts. *United States* v. *Rauscher*, 119 U.S. 407 (1886). *See also Ford* v. *United States*, 273 U.S. 594 (1927); *Cook* v. *United States*, 288 U.S. 102 (1933). Extradition treaties are intended to protect not only the interests of the contracting states, but also the interests of individuals in the territory of one contracting state whom the other state wishes to prosecute in its courts.

ARGUMENT

I.

PERMITTING RESPONDENT TO RAISE THE UNITED STATES' VIOLATION OF THE EXTRADITION TREATY AS A DEFENSE WOULD NOT PRESENT THE COURT WITH A NONJUSTICIABLE POLITICAL QUESTION

The Court of Appeals correctly rejected the Government's contention that permitting respondent to raise the legality of his abduction from Mexico under the Extradition Treaty as a defense would entail any nonjusticiable political questions because they potentially touch upon foreign affairs. As this Court observed in *Baker* v. *Carr*, 369 U.S. 186, 211 (1962), "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."[5/]

Courts have consistently held that issues involving claimed violations of international law, including the United States' obligations under its treaties, are justiciable and outside the realm of the political question doctrine. *DKT Memorial Fund, Ltd.* v. *Agency for International Development*, 810 F.2d 1236, 1238 (D.C. Cir. 1987) ("[w]hereas attacks on foreign policy making are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes

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[5/] "[N]onjusticiability based on [a] 'political question' is *at best a limited* doctrine." *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 796 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985) (emphasis in original).

may have an effect on foreign affairs").[6/] Indeed, in *Baker* v. *Carr*, 369 U.S. at 212, the Government's primary authority for the application of the political question doctrine, this Court plainly stated that the doctrine does not apply to the interpretation of treaties:

> For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action ... must be regarded as of controlling importance," if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer. [citations omitted].[7/]

Moreover, courts have routinely interpreted extradition treaties and have declined to apply the political question doctrine in cases involving extradition issues. In *United States* v. *Rauscher*,

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[6/] This principle has been applied in numerous recent cases in a wide variety of areas. *See, e.g., Boos* v. *Barry*, 485 U.S. 312 (1988) (the protection of diplomats); *Wardair Canada, Inc.* v. *Florida Department of Revenue*, 477 U.S. 1 (1986) (sensitive aviation relations); *Immigration and Naturalization Service* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987) (asylum determinations).

[7/] See also *Japan Whaling Association* v. *American Cetacean Society*, 478 U.S. 221, 229-230 (1986) ("As *Baker* [v. *Carr*] plainly held, however, the courts have the authority to construe treaties and executive agreements..."); *B. Altman & Co.* v. *United States*, 224 U.S. 583, 601 (1912):

> We think that the purpose of Congress [in enacting the Circuit Court of Appeals Act 1891] was manifestly to permit rights and obligations [involving the construction of treaties] to be passed upon in the Federal court of final resort, and that matters of such vital importance arising out of opposing constructions of international compacts, sometimes involving the peace of nations, should be subject to direct and prompt review of the highest court of the Nation.

119 U.S. 407 (1886), this Court interpreted the 1842 Webster-Ashburton Treaty between the United States and Great Britain as providing an implied rule of specialty.[8/] As a result, this Court overturned the conviction of the defendant who was tried and convicted of a crime other than that for which he was extradited pursuant to the terms of the treaty.[9/]

In *Galanis* v. *Pallanck*, 568 F.2d 234 (2d Cir. 1977), the Court of Appeals interpreted the extradition treaty between the United States and Canada as incorporating a double jeopardy provision. Significantly, the Court rejected the interpretation of the treaty espoused by the Executive Branch, stating that "[w]hile the views of the State Department are entitled to respect ... they are not controlling." 568 F.2d at 239.

In *In re Mackin*, 668 F.2d 122 (2d Cir. 1981), the Court of Appeals grappled with the issue of whether a United States Magistrate had jurisdiction to decide whether an offense committed by the person sought to be extradited to Great Britain was a "political offense" under the extradition treaty between the United

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[8/] This Court rejected the State Department's narrow interpretation of the Webster-Ashburton Treaty against a background of continuing controversy between executive officials in the United States and Great Britain as to the treaty's scope, because the issue was properly raised by the defendant and his liberty depended on the answer. 119 U.S. at 411, 415-416.

[9/] Similarly, in *Cook* v. *United States*, 288 U.S. 102 (1933), although involving the seizure of property rather than of persons, this Court permitted the petitioner to rely upon a 1924 treaty between the United States and Great Britain that regulated the boarding by U.S. officials of British vessels located in international waters to protest the seizure of a vessel in international waters. This Court held that the vessel's seizure violated the treaty and was unlawful. 288 U.S. at 121.

States and the United Kingdom. The Government argued, *inter alia*, that the issue of whether an offense is a political offense was a nonjusticiable political question. Again, the court rejected the Government's argument, stating as follows:

> The Government notes that a judicial decision on the political offense exception may cause difficulties in this country's foreign relations; such difficulties would exist also, indeed might be heightened, if decision were placed solely in the executive branch, unless the political offense exception were to be eviscerated in practice in the case of extradition treaties with nations with which we are allied or whose favor we especially desire.

668 F.2d at 133. The court recognized the perception from the early days of the nation that extradition without judicial oversight was "highly dangerous to liberty, and ought never to be allowed in this country", *citing In re Kaine*, 55 U.S. (14 How.) 103, 113 (1852). 668 F.2d at 134.

Further, in *Eain* v. *Wilkes*, 641 F.2d 504, 513-18 (7th Cir.), *cert. denied*, 454 U.S. 894 (1981), the Court of Appeals rejected the Government's attempt to prevent the court from reviewing the Government's position on the extradition of a prisoner to Israel. The Government argued that the court should abstain from reviewing extradition under the treaty at issue in order to avoid potential embarrassment for the Executive if the court's reading of the treaty differed. The Court of Appeals held that it could "construe [the] treaty and ... find it provides the answer." 641 F.2d at 514, *quoting Baker* v. *Carr*, 369 U.S. at 212. *See also Shapiro* v. *Fernandina*, 478 F.2d 894, 906 (2d Cir. 1973) ("[W]hile the conduct of foreign affairs is almost exclusively an executive function, extradition has, at least in the United States ... been generally a matter of judicial competence."); *Quinn* v. *Robinson* 783 F.2d 776, 790-91 (9th Cir. 1986) (Court of Appeals

rejected Government's attempt to preclude judicial review of extradition proceeding under political question doctrine).

As the Court of Appeals noted, the Government ignores the best evidence of courts' power to interpret extradition treaties and supervise the extradition process. Congress has expressly delegated to the courts the responsibility for determining whether persons within the United States may be extradited to another nation pursuant to a treaty. *See* 18 U.S.C. § 3184 (1988). The Court of Appeals correctly noted that "[i]n so doing, Congress entrusted to the courts the power to make precisely the kinds of interpretive decisions at issue in this case ... [c]ontrary to the government's suggestion, a judge who determines that a defendant has been brought into court in violation of an extradition treaty has not 'injected' the judiciary into a political dispute ... [h]e or she has merely carried out the court's constitutional function in light of the statutes Congress has seen fit to pass and the treaties it has ratified." *Verdugo-Urquidez*, 939 F.2d at 1357.

The Government's arguments in support of the application of the political question doctrine to this case are wholly without merit. First, the Government contends that the Court of Appeals' judgment authorizes judges to receive and weigh diplomatic communications addressed to the State Department—a task that courts are ill-equipped and not authorized to handle. Pet. Brief, at 38-39. The Government ignores the fact that in this case, the Government of Mexico communicated not only with the State Department but also directly with the court. J.A. 67. Moreover, courts often are authorized to make determinations based on communications they receive from foreign states. For example, the federal district courts are authorized to hear defenses to their jurisdiction raised by foreign states under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et. seq.*, or under the Act of

State Doctrine.[10/] In any event, the communication from the Government of Mexico unambiguously objects to the abduction as a violation of the Extradition Treaty.[11/] There are, therefore, no diplomatic issues for the court to weigh. It need only interpret the Extradition Treaty to determine if the abduction is a violation of its terms.

Significantly, *Ex parte Peru*, 318 U.S. 578 (1943), cited by the Government in its Brief, undermines the Government's argument that the courts cannot consider diplomatic communications. In *Ex parte Peru*, this Court recognized that district courts often receive and analyze communications from foreign governments. In discussing the district court's role in resolving sovereign immunity

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[10/] This Court often has found cases to be justiciable even though communications with foreign governments were integral to the issues presented. *See e.g.*, *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981); *United States* v. *Pink*, 315 U.S. 203, 229 (1942); *United States* v. *Belmont*, 301 U.S. 224, 230 (1937).

[11/] In its first diplomatic note of April 18, 1990, the Government of Mexico sought information "about the possible participation of U.S. authorities in [Respondent's] kidnap and transfer to the United States." J.A. 33. In its second diplomatic note dated May 16, 1990, the Government of Mexico stated that it "considers that the kidnapping of Dr. Alvarez Machain and his transfer from Mexican territory to the United States of America were carried out with the knowledge of persons working for the U.S. Government, in violation of the procedure established in the extradition treaty in force between the two countries," and requested respondent's return to Mexico. J.A. 35-36. On November 13, 1990, the Government of Mexico filed with the Court of Appeals a letter dated November 9, 1990 from Jose Angel Pescador Osuna, the Consul General of Mexico in Los Angeles, stating that the Government of Mexico considers respondent's abduction from Mexico to be a violation of the Extradition Treaty and requesting that he be repatriated to Mexico. J.A. 67.

issues (prior to the enactment of the Foreign Sovereign Immunity Act), this Court stated the following:

> Indeed, for the purpose of determining whether petitioner was entitled to the claimed immunity, the district court, in the absence of recognition of the immunity by the Department of State, had authority to decide for itself whether all the requisites for immunity existed ... [The Republic of Peru] has consistently declared its reliance on the immunity, both before the Department [of State] and in the district court. Neither method of asserting the immunity is inconsistent with the other.

318 U.S. at 587-89.

Second, the Government contends that the remedy of repatriation "cuts deeply into the government's authority to formulate this Nation's response the claim of an unlawful apprehension." Pet. Brief, at 39. Not surprisingly, the Government offers no support for this argument. This is because it is clear that the district court had authority to order the remedy of repatriation. Courts have inherent authority to protect themselves from complicity in an illegality or an injustice, *McNabb* v. *United States*, 318 U.S. 332, 341 (1943), and may do so by formulating procedural rules not specifically required by the Constitution or the Congress. *United States* v. *Hastings*, 461 U.S. 499, 505 (1983). See *Restatement (Third) of the Foreign Relations Law of the United States* § 432 (1986) (under international law, repatriation is the proper remedy where there has been an unauthorized abduction of a person by one nation from the territory of another nation). *See also United States* v. *Lira*, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975) (Oakes, J. concurring) ("[R]egardless of the abstract doctrine *Ker* and *Frisbie* are said to stand for, we can reach a time when in the interest of establishing and maintaining civilized standards of procedure and evidence, we may wish to bar jurisdiction in an

abduction case as a matter not of constitutional law but in the exercise of our supervisory power ...")[12/] In any event, whether the district court acted within its powers in ordering the remedy of repatriation is irrelevant to the justiciablity of this issues in this case.

Third, the Government contends that the determination of whether the Government's interest in enforcing its criminal laws justifies violating the Extradition Treaty is a policy judgment that is not for the courts to make. Pet. Brief, at 40. This argument has no validity. The Government's interest in law enforcement has never been considered sufficient to allow the United States to break the law. In *Olmstead* v. *United States*, 277 U.S. 438 (1928), in his influential dissent, Justice Brandeis wrote the following:

> And if this court should permit the government, by means of its officers' crimes to effect its purpose of punishing the defendants, there would seem all the elements of a ratification. If so, the government itself would be a law breaker.
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> * * *
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> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.

[12/] The Government purports to find support for its contention in the federal extradition statute, 18 U.S.C. § 3186, which vests the Secretary of State with the final decision-making power to extradite an individual, even upon a determination that an extradition request is legally sufficient. Pet. Brief, at 39. The Secretary of State's power under 18 U.S.C. § 3186, however, presupposes that the extradition procedures have been complied with by the requesting state. In the instant case, the United States simply ignored the Extradition Treaty with Mexico.

> In a goverment of laws, existence of the government will be imperilled it it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. *To declare that in the administration of the criminal law the end justifies the means — to declare that the government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.* [emphasis added].

277 U.S. at 484-85. *See Mapp* v. *Ohio*, 367 U.S. 643, 659 (1961) ("Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.").

There is no reason why this principle, long accepted in our jurisprudence, should apply with any less force with regard to the United States' treaty obligations.

The Government further contends that the Court of Appeals' holding would undermine this nation's interest in enforcing its criminal laws by enabling violators of United States law to acquire immunity from prosecution by seeking refuge in nations that have extradition treaties with the United States but are unwilling to cooperate in bringing those persons to trial. Pet. Brief, at 40. The absurdity of this argument is self-evident. It is much more likely that violators of United States law would seek refuge in countries with whom the United States did *not* have extradition treaties. In any event, the Government's argument that kidnapping

is necessary to criminal law enforcement is undercut by the fact that the Government never even requested Mexico to extradite Respondent. Thus, the Government never found out whether Mexico was unable or unwilling to cooperate in bringing Respondent to trial in the United States.[13/]

Consequently, the Court of Appeals' holding that this case does not fall under the nonjusticiable political question doctrine should be affirmed.

[13/] The Government cites *The Chinese Exclusion Case*, 130 U.S. 581 (1889), in support of its contention that the determination of whether an extradition treaty violation should take precedence over the nation's interest in enforcing our criminal laws is a policy judgment that is not for the courts to make. Pet. Brief, at 40. *The Chinese Exclusion Case*, which held that where a treaty directly conflicts with a federal statute, the one adopted first in time controls, is inapposite. In this case, no criminal law of the United States conflicts with the Extradition Treaty's provision regarding the extradition of Mexican nationals by the Government of Mexico.

II.

RESPONDENT HAS STANDING TO CHALLENGE THE DISTRICT COURT'S EXERCISE OF JURISDICTION OVER HIM BASED ON THE UNITED STATES' VIOLATION OF THE EXTRADITION TREATY

A. This Court Has Consistently Held That Individuals Have Standing To Enforce Extradition Treaties

Courts in the United States have consistently held that individuals have standing to challenge a court's criminal jurisdiction based on violations of extradition treaties. In *United States* v. *Rauscher*, 119 U.S. 407 (1886), this Court held that the defendant had standing under the 1842 Webster-Ashburton Treaty between the United States and Great Britain to raise the rule of specialty[14/] to challenge the exercise of the district court's criminal jurisdiction over him.[15/] 119 U.S. at 424. Significantly, this Court held that

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[14/] Under the rule of specialty, a person who has been extradited to another state cannot, unless the requested state consents, be tried by the requesting state for an offense other than one for which he was extradited. Nor can an extradited person receive a more severe punishment than was provided by the requesting state at the time of the request for extradition. *See Restatement (Third) of the Foreign Relations Law of the United States*, § 477 (1986).

[15/] In *Rauscher*, Great Britain surrendered a fugitive to the United States under Article 10 of the Webster—Ashburton Treaty. Although the prisoner was extradited on the charge of murder, he was prosecuted and convicted on the lesser offense of cruel and unusual punishment, a crime for which he had not been extradited. This Court reversed the conviction.

a rule of specialty could be properly implied notwithstanding the absence of an express provision in the treaty incorporating the rule of specialty. 119 U.S. at 430.

Similarly, in *Ford* v. *United States*, 273 U.S. 594 (1927), this Court permitted individuals facing prosecution in the United States to raise a violation by the United States of a treaty between the United States and Great Britain to challenge the exercise of the district court's jurisdiction. In *Cook* v. *United States*, 288 U.S. 102 (1933), this Court again recognized individual standing under treaties.[16/] *See United States* v. *Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (*per curiam*), *cert. denied*, 479 U.S. 1009 (1986) ("the person extradited may raise whatever objections the rendering country may have.") *see also* 1 M. Bassiouni, *International Extradition: United States Law and Practice*, Ch. 2, § 4.1 at pp. 71-72; § 4.2 at p. 74 (2d ed. 1984).

The Government erroneously contends that respondent has no standing to assert a violation of the Extradition Treaty absent an express provision conferring standing to individuals. Pet. Brief, at 36. But the absence of a specific domestic enforcement mechanism in the Extradition Treaty does not vitiate an individual's ability to enforce its provisions because it is self-executing and thus needs no enabling legislation to render it directly enforceable in United States' courts. This Court has on numerous occasions sanctioned the private enforcement of treaties notwithstanding the absence of

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[16/] In *Cook*, the United States seized a British vessel at a distance of more than one hour from the U.S. shore. Article II of the treaty at issue provided that only seizures of vessels within a one-hour range would not evoke protest from Britain. The owners of the seized vessels challenged the exercise of jurisdiction over the vessels and this Court granted them standing to do so. 288 U.S. at 121-22. This Court concluded that, because the treaty deprived the United States Government of authority to order the seizure in this instance, the libels against the ship and cargo should be dismissed. 288 U.S. at 122.

an express enforcement mechanism in the treaty. *See, e.g., Asakura* v. *Seattle*, 265 U.S. 332 (1924); *Cook* v. *United States*, *supra*; *Bacardi Corp. of America* v. *Domenech*, 311 U.S. 150 (1940); *Clark* v. *Allen*, 331 U.S. 503 (1947).

The Government also contends that *Rauscher*, *Ford* and *Cook* are not controlling because they are limited to situations in which the treaty at issue expressly prohibits the alleged violative conduct. Pet. Brief, at 20–21. But *Rauscher*, *Ford* and *Cook* stand for the proposition that treaties, including extradition treaties, are not necessarily limited to their express terms; they may contain implied obligations or prohibitions to further the purposes of those treaties and the intent of parties. Contrary to the Government's contention, the treaties construed in *Rauscher*, *Ford* and *Cook* did *not* contain express provisions prohibiting the conduct ultimately found to be in violation of those treaties. As the Court of Appeals correctly noted, *Rauscher* and its progeny "stand for the uncontroversial proposition that in construing treaties we must look to their purposes and implicit assumptions as well as their express proscriptions and prescriptions," thus permitting courts to interpret treaties to include implied provisions. *Verdugo-Urquidez*, 939 F.2d at 1354.

The Government further contends that *Rauscher*, *Ford*, and *Cook* are limited to cases in which the United States has resorted to an extradition treaty to obtain jurisdiction but then undertaken prosecutions that violated its terms. Pet. Brief, at 21-22. On this argument, the United States could avoid any limits on criminal prosecutions by simply disregarding the extradition treaty altogether and resorting to abduction. As the Court of Appeals observed in *Verdugo-Urquidez*, 939 F.2d at 1351, the argument would render the terms of the extradition treaty meaningless. ("It would elevate form over substance to hold that [the] protection of each sovereign nation's right to insist on strict compliance with the treaty may be

circumvented if the other party simply chooses not to invoke the treaty at all.").

For example, Article V of the Extradition Treaty prohibits extradition for "political" offenses or "purely military" offenses. Article VIII gives each nation the discretion to refuse to extradite anyone who might be executed for an offense for which the death penalty could not be imposed in the requested nation. The Government's interpretation of the Extradition Treaty would permit the Government simply to ignore these prohibitions contained in the Treaty by permitting forcible abductions of foreign nationals from Mexico in situations where the Government wishes to try them in the United States for non-extraditable offenses.[17/]

Consequently, the Government's position demonstrates why it is imperative that individuals be permitted to assert that abductions are violations of the Extradition Treaty, because to hold otherwise would encourage the Government to abduct individuals without resorting to the procedures set forth in its extradition treaties in situations where it does not wish to be bound by their limitations. The Government cannot be permitted to obtain jurisdiction by unlawful means when it simply chooses not to do so by lawful means.

There is thus no valid distinction between the specialty cases, like *Rauscher*, and this case. As the Court of Appeals, in *Verdugo-Urquidez*, demonstrated, the reasons for conferring individual standing in specialty cases and in the instant case are "nearly identical":

[17/] There is no doubt that the United States would consider an attempt by the Government of Mexico (or any other foreign government) to abduct a U.S. citizen from U.S. territory to stand trial in Mexico to be a fundemental breach of both the Extradition Treaty and of its own territorial sovereignty.

> The relevant factors bearing on whether a defendant should have standing are nearly identical in the two cases. Both concern a criminal prosecution. In both cases, the defendant objects to the process by which he has been brought before the court. In both cases the government of the country from which he has been removed has registered its objection — in one instance by a formal protest and in the other by expressly limiting the grant of extradition to trial for specific offenses. Finally, both cases concern rights rooted in an extradition treaty, and as a consequence, both cases touch upon the foreign relations of the United States and the other signatory to that treaty. Whatever concerns for the principle of separation of powers may be implicated in a case such as this one are implicated in precisely the same degree in the specialty cases — where we have long had no difficulty finding that an individual has standing to raise the treaty violation.

Verdugo-Urquidez, 939 F.2d at 1355-56.

Finally, the Government contends that individuals have no standing to enforce the Extradition Treaty because extradition treaties are agreements between nations only and are designed solely to create a framework for suppressing and punishing crime. Pet. Brief, at 34-35. This contention, too, is without merit. The Government ignores the undisputed case law, including *Rauscher*, *Ford* and *Cook*, holding that many treaties, including extradition treaties, provide an exception to the general rule that treaties are concluded solely for the benefit of the contracting states.[18/]

[18/] The *Head Money Cases*, 112 U.S. 580 (1884), *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), and *Dreyfus* v. *Von Finck*, 534 F.2d 24 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976), cited by the (continued...)

Moreover, as the Court of Appeals recognized, extradition treaties establish procedural requirements that serve to safeguard *both* the sovereign interests of the state parties and individuals subject to extradition. *Verdugo-Urquidez*, 939 F.2d at 1350 ("The requirements extradition treaties impose constitute a means of ... ensuring the fair treatment of individuals."); *see Rauscher*, *Ford*, and *Cook*.[19/]

18/(...continued)
Government, are not to the contrary. The Government relies on this Court's language in the *Head Money Cases* that treaties are primarily for the benefit of the contracting states. The Government ignores, however, the Court's finding in *the same case*, 112 U.S. at 598, that:

> [A] treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the Nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.

The Government also relies on *Argentine Republic* v. *Amerada Hess Shipping Corp.* for the proposition that "these conventions, however, only set forth substantive rules of conduct and state that compensation shall be paid for certain wrongs. They do not create private rights of action." 488 U.S. at 442. Again, the Government ignores the reality that, although some treaties, such as the Geneva Convention on the High Seas and the Pan American Maritime Neutrality Convention do not create individual rights, others, including the Extradition Treaty, plainly do. Finally, *Dreyfus* v. *Von Finck*, held only that treaties that do not intend private rights of action will not be construed to provide them. As shown above, the law is clear that extradition treaties are intended to confer individual standing to enforce them.

19/ Where a treaty protects a particular class of persons (in this case, individuals in general and nationals of Mexico in particular), it is logical that those persons should have standing to enforce the treaty. *See Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982).

This purpose is manifest in many of the provisions in the Extradition Treaty that are clearly designed to protect individual rights and thus confer enforceable private rights.[20] Article IX of the Extradition Treaty provides:

> Neither Contracting Party shall be bound to deliver up its own nationals, but the executive authority of the requested Party shall, if not prevented by the laws of that Party, have the power to deliver them up if, in its discretion, it be deemed proper to do so.

As the Court of Appeals correctly found, Article IX serves a dual purpose. It establishes the right of the contracting state parties not to have formally to surrender their nationals. It also protects the rights of individuals subjected to extradition to appeal to the Government in whose territory they reside that they not be extradited based on considerations of the individual's interests, including: 1) that a person should be tried by his or her peers; 2) that a state owes a duty of protection to its citizens; 3) that a citizen has a right to stay undisturbed in his or her homeland; and 4) that juries might exhibit bias toward a foreign defendant. *See* J. W. Garner, "Non-Extradition of American Citizens - The Neidecker Case," 30 *Am. J. Int'l L.* 480 (1936).

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[20] It should also be noted that the Extradition Treaty contains no language that would indicate an intent to *preclude* the enforcement of the Treaty by an individual. For example, the United States-Switzerland Treaty on Mutual Assistance in Criminal Matters, 27 U.S.T. 2019, T.I.A.S. No. 8302, expressly provides, with specific and enumerated exceptions, that the treaty "shall not give rise on the part of any person of the right to take any action in the United States to suppress or exclude any evidence or to obtain other judicial relief in connection with requests" pursuant to the treaty. Presumably, had the United States Government wished to preclude the creation of individual rights under the Extradition Treaty, it would have insisted on the inclusion of similar language.

Article X of the Extradition Treaty sets forth in detail the requirements for a proper extradition request, which constitute additional grounds for an individual's challenge to extradition, both formal and "informal." *See Verdugo-Urquidez*, 939 F.2d at 1351. Similarly, as cases like *Rauscher* make clear, the rule of specialty contained in Article XVII protects individual rights and provides individuals with standing to challenge prosecutions for non-extraditable offenses. Finally, as noted above, Article V of Extradition Treaty prevents extradition for "political" offenses and "purely military" offenses; and Article VIII permits the requested state to refuse extradition absent assurances that the death penalty will not be imposed. These provisions, too, reflect an intention to protect individuals.

In sum, the Extradition Treaty is intended to protect the rights of individuals and must confer standing on individuals to enforce violations of the Treaty. Surely, an individual who has been abducted by the United States should have standing to assert that the abduction is a complete denial of *all* of his rights protected by the Extradition Treaty.

B. The Government of Mexico's Diplomatic Protests Which Unambiguously Objected To Respondent's Abduction As A Violation of the Extradition Treaty Makes It Clear That Mexico Has Not Consented to The Abduction

The Government of Mexico has unequivocally protested the United States' violation of the Extradition Treaty and "has at all times demanded [his] immediate repatriation to Mexico." *Alvarez-Machain*, 946 F.2d at 1467. The Court of Appeals, in *Verdugo-Urquidez*, held that Mexico's diplomatic protests to Respondent's abduction vested Respondent with "derivative

standing" to challenge the district court's jurisdiction over him based on the United States' alleged violation of the Extradition Treaty. 939 F.2d at 1356-57. *See Alvarez-Machain*, 946 F.2d at 1467.[21/]

Although respondent has standing to assert the Extradition Treaty violations with or without Mexico's protest, some cases appear to require that the offended state protest the treaty violation as a prerequisite to individual standing to assert the treaty violation. The reason for this requirement is that, because it is the state party who is initially injured when the other state party violates a treaty, some courts have had difficulty permitting individuals to assert a right under a treaty where the state party to that treaty has indicated either directly or indirectly that it acquiesces in the violation. These courts have construed the absence of protest by the offended state as a waiver of its rights under the relevant treaty or acquiescence in the treaty violation. *See, e.g., Matta-Ballesteros* v. *Henman*, 896 F.2d 255 (7th Cir.), *cert. denied* 111 S.Ct. 209 (1990); *Jaffe* v. *Smith*, 825 F.2d 304 (11th Cir. 1987); *United States* v. *Najohn*, 785 F.2d 1420, 1422 (9th Cir.) (*per curiam*), *cert. denied*, 479 U.S. 1009 (1986); *United States* v. *Zabaneh*, 837 F.2d 1249, 1251 (5th Cir. 1988).

Mexico's unequivocal protests, however, demonstrate that Mexico has not acquiesced in respondent's abduction in violation of the Extradition Treaty. Thus, under the relevant case law, there

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[21/] The Government contends that Mexico's protest is "irrelevant to the issue of respondent's standing" because the Extradition Treaty contains no express language entitling an individual to assert a treaty violation. Pet. Brief, at 35-36. As discussed above, respondent has standing to assert the United States' violation of the Extradition Treaty even though the Treaty does not expressly authorize him to do so.

is no doubt whatever that Respondent has standing to raise the United States' violation of the Extradition Treaty.

Consequently, the Court of Appeals decision that Respondent has standing to assert the United States' violation of the Extradition Treaty as a defense to the district court's jurisdiction over him should be affirmed.

CONCLUSION

On the basis of the foregoing and on the basis of Respondent's Brief, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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